

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

AUG 07 2006

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

TERRENCE D. BROTHERS,

Petitioner - Appellant,

v.

E. K. MCDANIEL, Warden,

Respondent - Appellee.

No. 05-15260

D.C. No. CV-02-00422-LRH

MEMORANDUM*

Appeal from the United States District Court
for the District of Nevada
Larry R. Hicks, District Judge, Presiding

Submitted July 25, 2006**
San Francisco, California

Before: HUG, KLEINFELD, and PAEZ, Circuit Judges.

Nevada state prisoner Brothers appeals from the District Court's refusal to grant him an evidentiary hearing when denying his habeas petition challenging his

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

guilty plea conviction for first degree murder with use of a deadly weapon. We review a district court's denial of a habeas petition *de novo*.¹

Brothers concedes that his state habeas petition was procedurally defaulted. He fails to “show that some objective factor external to [his] defense” caused his procedural default.² There is no right to counsel on state collateral review, so Brothers cannot use an ineffective assistance of counsel claim to overcome a procedural default.³ Brothers requests that we extend Loveland v. Hatcher⁴ in order to grant him an evidentiary hearing on the issue of his procedural default, but Loveland is not Supreme Court authority as 28 U.S.C. § 2254 requires, and it is not analogous. In Loveland the petitioner thought his attorney had appealed, but in this case, the petitioner waived his right to appeal. Brothers gives no reason why he should be given an evidentiary hearing, so we will not extend Loveland to the degree he requests.

¹ Nulph v. Cook, 333 F.3d 1052, 1056 (9th Cir. 2003).

² Murray v. Carrier, 477 U.S. 478, 488 (1986).

³ Smith v. Idaho, 383 F.3d 934, 939 amended and superceded by 392 F.3d 350, 356-57 (9th Cir. 2004).

⁴ Loveland v. Hatcher, 231 F.3d 640 (9th Cir. 2000).

We will not grant a Certificate of Appealability on Brothers's uncertified claims because no "jurists of reason would find it debatable" that Brothers states any "valid claim[s] of the denial of a constitutional right[s]." ⁵

AFFIRMED.

⁵ Petrocelli v. Angelone, 248 F.3d 877, 883-84 (9th Cir. 2001) (citing Slack v. McDaniel, 529 U.S. 473 (2000)).